No._____

In the
Supreme Court of the United States

OCTOBER TERM 1947

JOSEPH A. WHETSTONE, *Petitioner,*

vs.

STATE OF WASHINGTON, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

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To the Honorable, The Supreme Court of the United States:

Joseph A. Whetstone, petitioner herein, prays that a Writ of Certiorari be issued to review the judgment of the Superior Court of the State of Washington, affirming the judgment and sentence of the Superior Court of the State of Washington for King County, which said judgment and sentence found the petitioner herein guilty of the crime of bribery, in two Counts, and imposed a sentence of imprisonment in the Washington State Penitentiary on each Count thereof.

SUMMARY AND SHORT STATEMENT OF MATTER INVOLVED

This petition seeks review of a final judgment in a criminal case. By Grand Jury, petitioner herein was indicted on two Counts of bribery. The verdict of a jury returned a finding of guilty on each Count. Thereafter, motions in arrest of judgment and for new trial were seasonably interposed. Extended argument was

had on the motion for new trial, and the question at issue in the above entitled Court herein arose from matters presented on the motion for new trial. It is contended on behalf of the petitioner herein that he was not accorded a fair and constitutional trial by a jury composed of impartial jurors, and particular reference is made to one juror, whose name is Gervalia. It is the position of the petitioner that by reason of prior expressed statements of the juror Gervalia, not unqualifiedly denied, that the verdict was attainted and that the inquiry at the time of the motion for new trial, conducted by the trial judge, was improper since no question of fact was raised by the affidavits presented by both parties for hearing of the motion for new trial. It is the practice in the State of Washington to hear motions for new trial on affidavit. (Remington's Revised Statutes, State of Washington, Sec. 2181, 2182.)

The trial court, over objection of defense counsel, summoned the assailed juror, and others who were reportedly present at the time the said assailed juror Gervalia expressed his bias and prejudice prior to trial, for a hearing in open court, and at that time questioned these individuals, determined as a question of fact that said juror Gervalia was impartial, and denied the motion for a new trial. An appeal was taken from the entry of the judgment and sentence to the Supreme Court of the State of Washington, and the judgment and sentence were affirmed by the Supreme Court of the State of Washington.

The circumstances attendant upon the making of

the statements by the juror Gervalia are more fully described in the Brief accompanying this Petition, and show conclusively that no question of fact was raised sufficient to permit the trial court to pass thereon upon motion for new trial. To put it briefly, the petitioner herein was deprived of his constitutional rights under the Fourteenth Amendment to the Constitution of the United States. This matter was called to the attention of the trial court and decided adversely to petitioner. Thereafter, upon appeal, the matter was again called to the attention of the Appellate Court of the State of Washington, specifically referring to the Constitution of the United States, and the Supreme Court of the State of Washington in its decision passed upon that question and decided adversely to the petitioner, and so stated in a certificate signed and filed by the Chief Justice of the Supreme Court of the State of Washington (R. 16).

Upon the affirmance by written opinion of the Supreme Court of the State of Washington, a petition for re-hearing was seasonably filed and subsequently denied. Here again the question of violation of the constitutional rights of the petitioner was raised and presented to the Court, and by its denial of the Petition for Re-Hearing this question was decided adversely to the petitioner (R 15).

The review of this cause in the Supreme Court of the State of Washington was by one Department of the Court, with four of the eight Justices and the Chief Justice sitting thereon. This matter was not heard *en banc.*

JURISDICTION

1. Jurisdiction of this court is sustained by Judicial Code, section 237 (b), as amended by Act of February 13, 1925, c.229, sec. 1, 43 Stat. 937, 28 U.S.C.A. sec. 344 (b); 8 F.C.A. sec. 344 (b).

2. Review is sought under Rule 38, 5 (a), Rules of this Court. The federal question of substance which has been decided by the state court contrary and not in accord with applicable decisions of this court is as follows:

(a) Where it is affirmatively shown, in accord with the Rules of Practice of the trial court and in the manner prescribed by law, that one of the jurors did not disclose on his *voir dire* examination that he had previously indicated by his own verbal expressions that he was not impartial, but in the converse had decided opinions as to the guilt of the defendant on trial, and had determined if chose as a juror to find that defendant guilty, that the defendant's right to a jury of unbiased and impartial citizens of his community has been abridged.

(b) It is conceded that if a question of fact is raised in the manner prescribed by law as to the impartiality of the juror, the determination of the trial court on motion for new trial, in the absence of a clear showing of abuse of discretion, is conclusive.

(c) However, it is the position of the petitioner herein that where the record shows conclusively that the impartiality is established in the manner prescribed by law (motion for new trial, Remington's

Revised Statutes, State of Washington, section 2181-2) no question of fact is raised for determination by the trial court and the verdict is attainted, the defendant has not been accorded the rights which he is endowed and he should be accorded a new and fair trial. *State v. Swafford*, 88 Wash. 659.

3. The right to a fair trial in a criminal cause by a jury composed of impartial individuals is fundamental and is protected from abridgement by action of a state under the Fourteenth Amendment to the Federal Constitution.

Smith v. U.S. 112 Fed. (2d) 217;
Clark v. U.S. 289 U.S. 1; 77 L. ed. 993, 53 Sup. Ct. 465.

The State of Washington Supreme Court in its opinion recognized the applicability of the Federal Constitution limitation, but nevertheless held directly contrary to the decisions of this court. The precise question involved herein, where no question of fact on motion for new trial is raised by reason of the substance of the record, has not to petitioner's knowledge been passed upon by the United States Supreme Court and therefore a Writ of Certiorari should be granted herein so that this question may be determined.

4. The judgment of the Superior Court of the State of Washington was entered March 26, 1948. The order denying Petition for Re-Hearing was entered on May 27, 1948.

On August 14, 1948, Mr. Justice William O. Doug-

las granted an extension of time for filing the petition and supporting brief herein to and including the 20th day of September, 1948. This petition is presented prior to September 20, 1948.

5. The Federal question was timely raised and passed upon. The argument upon motion for new trial presented that question to the trial court (R. 30, R. 21, 23, 24, 27, 28, 29). Thereafter in the appeal to the Supreme Court of the State of Washington the matter was again presented to the court in the briefs, the oral argument, and the petition for re-hearing (R. 15).

In addition thereto, Chief Justice of the Supreme Court of the State of Washington has by written certificate acknowledged that the matter of the Federal question was presented to his court (R. 16). By the judgment and denial of the re-hearing, by the Supreme Court of the State of Washington, the petitioner's claim of constitutional right has been effectually denied and passed upon.

6. The judgment on which review is sought is a final judgment of the Supreme Court of the State of Washington, re-affirming the entry of judgment and sentence in the Superior Court of the State of Washington.

QUESTIONS PRESENTED

1. Where one of the jurors does not unequivocally deny having uttered prior statements showing bias and prejudice, have the constitutional rights of the petitioner been violated?

2. Does the Fourteenth Amendment to the Federal Constitution afford protection to a citizen under the circumstances set forth in the prior question?

REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT

The Supreme Court of the State of Washington, in the case of *State v. Swafford, supra*, recognized that the Fourteenth Amendment to the Constitution of the United States applied to jury trials in the State Courts by declaring that where a juror had previously expressed prejudice and bias, did not disclose the same upon his *voir dire* examination, was accepted as a juror, and subsequently when his prior statements were made known to the convicted defendant, did unequivocally deny having made said statements, the verdict was attainted, and that no question of fact was raised for determination of the trial court upon a motion for new trial. Notwithstanding this declaration, which would satisfy the ordinary presumption that the State Courts follow the Constitution of the United States, and amendments thereto, nevertheless, in the instant case, the Supreme Court of the State of Washington refused to apply the doctrine of the *Swafford* case, *supra*, leaving no recourse but to apply to the Supreme Court of the United States for protection and redress.

It is respectfully represented that this question, under the peculiar circumstances detailed herein, has not heretofore been presented to the Supreme Court of the United States, and that therefore this is a proper

matter for the granting of the Writ of Certiorari to permit the Supreme Court of the United States to pass upon this question. It is respectfully submitted that the Writ of Certiorari should be issued.

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

I.

OPINION OF THE COURT BELOW

The opinion of the Supreme Court of the State of Washington was reported in 130 Wash. Dec. 278 (R. 9). The order denying re-hearing was reported 130 Wash. Dec. 819 (R. 15).

II.

JURISDICTION

Jurisdiction is fully covered in the foregoing petition, and that section is adopted here by reference.

III.

STATEMENT OF THE CASE

A concise statement of the case is contained in the accompanying petition under the heading "Summary and Short Statement of Matter Involved," and is here adopted by reference.

The factual situation attendant herein at the time of trial and shortly thereafter is important to the determination of the legal question involved. Counsel for the petitioner herein were not aware of the biased statements expressing prejudice of the assailed juror, Gervalia, until after the return of the verdict and at a time prior to the hearing of the motion for new trial (R. 21, 27).

An additional juror, named Johnson, was also assailed upon the basis that he had made certain statements during the trial of the cause. These statements by affidavit juror Johnson categorically denied. It is conceded by petitioner that the trial court's determination on motion for new trial that juror Johnson did not make the claimed statements is conclusive; hence, a direct question of fact was raised. However, the situation with reference to juror Johnson is included herein for the purpose of indicating clearly that from a legal standpoint, for the protection of accused persons, a very decided difference exists where a question of fact is raised as to prejudice of a juror, and where the juror does not deny having made his prior expressed statements.

In the latter case, which raises the question before this Court in this petition, since the juror Gervalia did not deny having made these statements (R. 28, 29), no question of fact was raised, and it becomes apparent upon its face that the defendant below, petitioner herein, was not accorded his full constitutional rights in that he was deprived of a fair and impartial trial, and that his verdict was achieved without regard to due process as guaranteed by the Fourteenth Amendment to the Constitution of the United States.

The trial court, over objection of counsel for the petitioner herein, summoned the juror Gervalia, and others present when he made his prior expressed statements of prejudice, and interrogated them in open court. This interrogation was conducted under circumstances most unfavorable to the petitioner and was conducted in the main by the trial court himself making use of leading questions, suggestive questions, and questions indicative of the answers apparently desired (R. 50-69). In short, the record upon affidavits, as provided for by the practice in the State of Washington on motion for new trial (Remington's Revised Statutes, sec. 2181-2), was clear and unequivocal on its face and directly within the purview, language, and the intent of *State v. Swafford*, 88 Wash. 659. However, after the interrogation in open court, as aforesaid, by the trial court, the answers were sufficiently confused and equivocal to lead the trial court then to hold that as a question of fact the juror Gervalia was not prejudiced and partial.

IV.

SPECIFICATIONS OF ERROR

1. The trial court and the State Supreme Court erred in holding that the trial court was entitled to determine the question of prejudice and partiality of the juror Gervalia as a question of fact.

2. The trial court and the State Supreme Court erred in holding that there was no sufficient showing that the juror Gervalia was partial and prejudiced and that the verdict was attainted.

V.

SUMMARY OF ARGUMENT

A. The petitioner herein was deprived of his constitutional right to have his fate in a criminal cause determined by a jury of impartial citizens.

B. The Fourteenth Amendment to the Federal Constitution protects from abridgement by State action the right to trial by jury in a criminal cause by impartial jurors.

C. The federal question was raised in a timely manner, was passed upon by the State court, and is properly reviewable.

D. The judgment of the State Supreme Court is final.

VI.

ARGUMENT

A. The petitioner herein was deprived of his constitutional right to have his fate in a criminal cause determined by a jury of impartial citizens.

This Court and the various Federal Circuit Courts of Appeal have consistently held that one of the fundamental rights guaranteed by the Fourteenth Amendment to the Constitution is that of the right of trial by jury in a criminal cause, where imprisonment follows, and that each of the members of the jury must be fair and impartial. *Smith v. U.S.*, 112 Fed. (2) 217; *Clark v. U.S.*, 289 U.S. 1; 77 L. ed. 993; 53 Supreme Ct. 465, wherein it is said by MR. JUSTICE CARDOZA:

> "A talesman when accepted as a juror becomes a part or member of the court. *Re Savin*, 131 U.S. 267, 33 L. ed. 150, 9 S. Ct. 699; *United States v. Dachis* (D.C.) 36 F.(2d) 601. The judge who examines on the *voir dire* is engaged in the process of organizing the court. If the answers to the questions are wilfully evasive or knowingly untrue, the talesman, when accepted, is a juror in name only. His relation to the court and to the parties is tainted in its origin; it is a mere pretense and sham. What was sought to be attained was the choice of an impartial arbiter. What happened was the intrusion of a partisan defender. If a kinsman of one of the litigants had gone into the jury room disguised as the complaisant juror, the effect would have been no different. The doom of mere sterility was on the trial from the beginning."

B. The Fourteenth Amendment to the Federal Constitution protects from abridgment by State action the right to trial by jury in a criminal cause by impartial jurors.

It is fundamental, taken not only from the common law of England but from the very founders of our

Constitution and the writers of amendments thereto, that the right to trial by jury presupposes and includes a jury, regardless of the number prescribed, of fair and impartial citizens. This Court has recognized that the test to whether a right is protected under the Fourteenth Amendment is whether or not the right is basic and essential. *Palko v. Connecticut*, 302 U.S. 319, 58 Supreme Ct. 149, 82 L. ed. 288. Despite the fact that this Court has not passed upon the question of whether the Fourteenth Amendment to the Federal Constitution protects the right sought to be protected herein, nevertheless inferior Federal courts have so held. *Baker v. Hudspeth*, C.C.A. 10, 129 F.(2) 779, wherein it was held that a denial of twelve impartial jurors is a denial of due process under Amendments Five and Fourteen to the Federal Constitution, as well as a violation of Amendment Six thereof.

C. The federal question was raised in a timely manner, was passed upon by the State court, and is properly reviewable.

The federal question was first presented to the State Court upon motion for new trial (R. 21). Thereafter it was raised by briefs and oral argument in the State Supreme Court (R. 15). This is attested by the certificate of Chief Justice of the Supreme Court of the State of Washington (R. 16). This Court has held that the State Supreme Court considering and ruling on the question supports jurisdiction even if the federal question had not been raised at all in the trial court. *Home Insurance Co. v. Dick*, 281 U.S. 397, 50

S. Ct. 338, 74 L. ed. 926. This is also true if the federal question were not raised until a petition for re-hearing were filed. *Great Northern Ry. v. Sunburst Oil Co.*, 287 U.S. 358, 53 S. Ct. 145, 77 L. ed. 360.

D. The judgment of the State Supreme Court is final.

This being a criminal cause, and a judgment and sentence having been entered upon the verdict of the jury, and an appeal having been taken in due course and in proper manner to the Supreme Court of the State, the judgment of affirmance of the said State Supreme Court is final, binding, and conclusive.

VII.

CONCLUSION

It is respectfully submitted that it has been shown that jurisdiction lies in the Supreme Court of the United States to issue to the Supreme Court of the State of Washington a Writ of Certiorari herein.

Respectfully submitted,

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